

Barrier Crimes to Employment in Licensed Medical Care Facilities

Rebekah E. Allen, JD

Senior Policy Analyst

Office of Licensure and Certification

Virginia Department of Health

| Agency | Agency has oversight? | Applicable groups | Time limits? | Tiered levels? | Federal requirements? | Waiver or exception process? | Demographic data? |
|--------------|-----------------------|---|--------------|----------------|-----------------------|------------------------------|-------------------|
| DBHDS | Yes | State facilities, CSBs, and licensed providers | Yes | No | No | Yes | No |
| DSS | Yes | Foster/adoptive parents, child/adult day programs, assisted living facilities | Yes | Yes | Yes | Yes | No |
| VDH | Yes | Nursing homes, home care organizations, hospice | Yes | No | No | No | No |

What should or should not be a barrier crime?

- Policy decision for the General Assembly
- No federal barrier crime prohibition for medical care facilities
 - Controlled substance crimes are not barriers at the state level for these programs
- May want to revisit whether to include violations of Code of Virginia § 18.2-51.7 (female genital mutilation)
 - Only crime in Article 4 of Chapter 4 of Title 18.2 of the Code of Virginia not included in the definition of “barrier crime”
 - Can only be perpetrated against a minor
 - Arguably of comparable seriousness to other barrier crimes already included for VDH’s programs

Time limits on barrier crimes

- Policy decision for the General Assembly
- Current time limit is 5 years after single misdemeanor not involving abuse or neglect
- No time limit on felony convictions of any kind (i.e., permanent disqualifier)
- Some states set time limits by category or severity, but also build in flexibility around waiving some or all time limits

Exceptions, waivers, or appeals process

- Statutory exception currently exists:
 - May hire someone convicted of one barrier crime if:
 - punishable as a misdemeanor
 - does not involve abuse or neglect
 - five years have elapsed following the conviction
- Exceptions are not discretionary
 - Must be permitted to hire if prospective employee meets criteria
 - No variance/waiver can be granted if criteria is not met
- No flexibility to meet workforce demands in areas with low levels of qualified staff and high patient/client demands (e.g., rural areas) or other public health challenges as they may arise

Demographic data & recidivism rates

- VDH does not perform or facilitate criminal background checks, so it does not have relevant data available
- When performing inspections, field staff pull randomly selected personnel files for completeness and compliance

Other states' requirements

- Majority of states have disqualifying barrier crimes, broadly grouped in the following categories:
 - Violent crimes against the person
 - Sexual crimes against the person
 - Crimes against the vulnerable
 - Crimes against property
 - Crimes involving a controlled substance
- Majority of states specifically list crimes rather than categories of crimes
- Majority of states include felony and misdemeanor convictions
- Wide variability in disqualification time periods

Tiers of barrier crimes

- Policy decision for the General Assembly
- Centers for Medicare and Medicaid Services (CMS) examined this issue 2012 in long-term care settings
 - Preliminary Option 1 - 3-tier system based on crime severity with disqualification time periods for each tier; variance/waiver process at any time with consideration of rehab factors; only addressed felony convictions with misdemeanors at State discretion
 - Preliminary Option 2 - general categories of disqualifying convictions, with minimum disqualification time periods for each category; variance/waiver process after minimum time elapsed with consideration of rehab factors
 - Consolidated Option - general categories of disqualifying convictions, with minimum disqualification time periods for each category; variance/waiver process at any time with consideration of rehab factor

SELECTED SLIDES FROM PRIOR PRESENTATION

Barrier Crimes

- Any offense listed in clause (i) of Va. Code § 19.2-392.02
- Nearly 140 offenses listed, split into “any conviction” and “any felony conviction”
- Any felony conviction for:
 - Violating protective orders
 - Criminal street gang activity
 - Stalking
 - Dangerous use of firearms or other weapons
 - Commercial sex trafficking, prostitution, etc.
 - Riot and unlawful assembly

Barrier Crimes (cont.)

Any conviction for:

- Homicide
- Assaults and bodily woundings
- Abduction and kidnappings
- Terrorism
- Robbery and carjacking
- Extortion and other threats
- Criminal sexual assault
- Arson and related crimes
- Treason and related offenses
- Violating the Uniform Machine Gun Act and the "Sawed-Off" Shotgun and "Sawed-Off" Rifle Act
- Possession of firearms while in possession of certain substances
- Failing to secure medical attention for injured child
- Sex trafficking and incest
- Family offenses; crimes against children, Etc.
- Conspiracy or Incitement to riot; injury to persons or property during riots; other offenses during a riot
- Activities tending to cause violence
- Paramilitary activity
- False entries or destruction of records by officers
- Escape of, communications with and deliveries to prisoners and felonies by prisoners

Enforcement of Barrier Crimes Requirements

- VDH OLC conducts licensure inspections to ascertain compliance with state statutes and regulation
 - If a licensee is also certified, VDH OLC or an accrediting organization will conduct a federal survey on behalf of CMS to ascertain compliance with Conditions of Participation
- Common deficient practices and issues related to barrier crimes:
 - Barrier crime conviction on CRCs, but person is still employed
 - Not doing CRCs within 30-days of employment
 - Use of a third party vendor for background checks, rather than the VSP
 - Sworn statements not in personnel files or are missing entirely
 - Administrators believing that CRC requirement does not apply to them
 - Failure to include CRC process in the licensee's policies and procedures
 - Allowing an employee to work independently prior to obtaining CRC